Billing Code: 6560-50-P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

EPA-R08-OAR-2012-0350; FRL- 9844-9

Disapproval of State Implementation Plans; State of Utah; Interstate Transport of Pollution for the 2006 $PM_{2.5}$ NAAQS

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: EPA is taking final action to disapprove a portion of a State Implementation Plan (SIP) submission from the State of Utah that is intended to demonstrate that its SIP meets certain interstate transport requirements of the Clean Air Act ("Act" or "CAA") for the 2006 fine particulate matter ("$PM_{2.5}$") National Ambient Air Quality Standards (NAAQS). Specifically, EPA is disapproving the portion of the Utah SIP submission that addresses the CAA requirement prohibiting emissions from Utah sources from significantly contributing to nonattainment of the 2006 $PM_{2.5}$ NAAQS in any other state or interfering with maintenance of the 2006 $PM_{2.5}$ NAAQS by any other state. Under a recent court decision, this disapproval does not trigger an obligation for EPA to promulgate a Federal Implementation Plan (FIP) to address these interstate transport requirements.

EFFECTIVE DATE: This final rule is effective [FEDERAL REGISTER: insert date 30 days after publication in the Federal Register].

ADDRESSES: EPA has established a docket for this action under Docket ID No. EPA-R08-OAR-2012-0350. All documents in the docket are listed on the www.regulations.gov website. Although listed in the index, some information is not publicly available, e.g., Confidential

Business Information (CBI) or other information whose disclosure is restricted by statute. Certain other material, such as copyrighted material, is not placed on the Internet and will be publicly available only in hard copy form. Publicly available docket materials are available either electronically through www.regulations.gov or in hard copy at the Air Program, Environmental Protection Agency (EPA), Region 8, 1595 Wynkoop Street, Denver, Colorado 80202-1129. EPA requests that if at all possible, you contact the individual listed in the **FOR FURTHER INFORMATION CONTACT** section to view the hard copy of the docket. You may view the hard copy of the docket Monday through Friday, 8:00 a.m. to 4:00 p.m., excluding Federal holidays.

FOR FURTHER INFORMATION CONTACT: Adam Clark, Air Program, U.S. Environmental Protection Agency, Region 8, Mailcode 8P-AR, 1595 Wynkoop, Denver, Colorado 80202-1129, (303) 312-7104, clark.adam@epa.gov.

SUPPLEMENTARY INFORMATION:

Definitions

For the purpose of this document, we are giving meaning to certain words or initials as follows:

(i) The words or initials Act or CAA mean or refer to the Clean Air Act, unless the context indicates otherwise.

(ii) The words EPA, we, us or our mean or refer to the United States Environmental Protection Agency.

(iii) The initials NAAQS mean or refer to National Ambient Air Quality Standards.

(iv) The initials SIP mean or refer to State Implementation Plan.

(v) The initials UDEQ mean or refer to the Utah Department of Environmental Quality.

(vi) The words Utah and State mean the State of Utah.

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I. Background

On October 17, 2006 EPA promulgated a new NAAQS for $PM_{2.5}$, revising the level of the 24-hour $PM_{2.5}$ standard to 35 $\mu g/m^3$ and retaining the level of the annual $PM_{2.5}$ standard at 15 $\mu g/m^3$. (71 FR 61144). By statute, SIPs meeting the "infrastructure" requirements of CAA sections 110(a)(1) and (2) are to be submitted by states within three years after promulgation of a new or revised standard. Among the infrastructure requirements of section 110(a)(2) are the "interstate transport" requirements of section 110(a)(2)(D).

CAA section 110(a)(2)(D)(i) identifies four distinct elements related to the evaluation of impacts of interstate transport of air pollutants. In this action for the state of Utah, EPA is addressing the first two elements of section 110(a)(2)(D)(i) with respect to the 2006 $PM_{2.5}$ NAAQS.[1] The first element of section 110(a)(2)(D)(i) requires that each SIP for a new or revised NAAQS contain adequate provisions to prohibit any source or other type of emissions activity within the state from emitting air pollutants that will "contribute significantly to nonattainment" of the NAAQS in another state. The second element of CAA section 110(a)(2)(D)(i) requires that each SIP for a new or revised NAAQS contain adequate provisions to prohibit any source or

[1] This action does not address the two elements of the transport SIP provision (in CAA section 110(a)(2)(D)(i)(II)) regarding interference with measures required to prevent significant deterioration of air quality or to protect visibility in another state. We will act on these elements in a separate rulemaking.

other type of emissions activity in the state from emitting pollutants that will "interfere with maintenance" of the applicable NAAQS in any other state.

On September 21, 2010, the Utah Department of Environmental Quality (UDEQ) provided a submission to EPA certifying that Utah's SIP is adequate to implement the 2006 $PM_{2.5}$ NAAQS for all the "infrastructure" requirements of CAA section 110(a)(2)(D), including the requirements of CAA section 110(a)(2)(D)(i)(I).[2]

On May 20, 2013 (78 FR 29314), EPA proposed to disapprove Utah's September 2010 submission with regard to the interstate transport requirements of CAA section 110(a)(2)(D)(i)(I). As explained in that notice, *id.* at 29317, we proposed to disapprove this element of Utah's submission because there is no basis for EPA to conclude that the existing SIP is adequate to satisfy the significant contribution to nonattainment and interference with maintenance elements of section 110(a)(2)(D)(i)(I).

II. Response to Comments

EPA received one letter on June 14, 2013 containing comments from the Sierra Club. The letter supported our proposed disapproval of Utah's submission, but disagreed with other aspects of our proposal. The significant comments in the letter and EPA's responses are given below.

Comment 1: The commenter disagrees with EPA's statement that disapproval of Utah's infrastructure SIP, as it relates to section 110(a)(2)(D)(i)(I) requirements, would not trigger a mandatory duty for EPA to promulgate a FIP to address these requirements. Specifically, the commenter contends that the plain language of the CAA requires EPA to issue a FIP within two years of a disapproval action. In addition, the commenter contends that the decision in *EME*

[2] UDEQ's submission is included in the docket for this action.

Homer City Generation v. *EPA,* 696 F.3d 7 (D.C. Cir. 2012), *cert. granted*, 2013 U.S. LEXIS 4801 (U.S. June 24, 2013) (No. 12-1182) (*EME Homer City*), is not binding or persuasive because it was incorrectly decided. The commenter also contends that the decision is inconsistent with previous decisions by the District of Columbia (D.C.) Circuit Court of Appeals. The commenter further suggests that EPA should not voluntarily follow the incorrectly decided *EME Homer City* opinion, particularly in the context of an infrastructure action that only impacts sources in Utah, a state within the jurisdiction of the Tenth Circuit Court of Appeals rather than the D.C. Circuit Court of Appeals.

Response 1: EPA has historically adopted the commenter's interpretation: disapproval of section 110(a)(2)(D)(i)(I) would trigger an obligation for the Agency to promulgate a FIP within two years unless the state submitted and EPA approved a SIP to correct the deficiency within that time. EPA continues to agree that the plain language of the statute establishes these obligations, and for those reasons, we asked the U.S. Supreme Court to review the D.C. Circuit's decision in *EME Homer City*. On June 24, 2013 the Supreme Court agreed to do so.

In the meantime and because the mandate from the D.C. Circuit was issued to EPA in February 2012, EPA intends to act in accordance with the *EME Homer City* opinion. In particular, the D.C. Circuit court concluded that EPA does not have authority to promulgate a FIP to address the requirements of section 110(a)(a)(2)(D)(i)(I) until EPA has identified emissions in a state that significantly contribute to nonattainment or interfere with maintenance of the NAAQS in another state and given the state an opportunity to submit a SIP to address those emissions. *EME Homer City*, 696 F.3d at 28. Because EPA has not identified or quantified any potential contribution and or interference from Utah to other states, or given the State an opportunity to submit a SIP to address any potential downwind contribution following

action by EPA to quantify that contribution, our disapproval action today does not obligate Utah to take any action or make a new SIP submission, nor does it trigger an obligation for EPA to promulgate a FIP.

EPA also disagrees with the commenter's suggestion that the Agency need not follow the D.C. Circuit's decision in *EME Homer City* in the context of an infrastructure action for Utah. The EPA rule reviewed by the court in *EME Homer City*—"Federal Implementation Plans: Interstate Transport of Fine Particulate Matter and Ozone and Correction of SIP Approvals," 76 FR 48207 (August 8, 2011), also known as the Cross State Air Pollution Rule (CSAPR)—was designated by EPA as a "nationally applicable" rule within the meaning of section 307(b)(1) of the CAA. *See id.* at 48352. Accordingly, all petitions for review of the CSAPR had to be filed in the U.S. Court of Appeals for the D.C. Circuit and could not be filed in any other federal court. 42 U.S.C. 7607(b)(1). Accordingly, EPA believes the D.C. Circuit's decision in *EME Homer City* vacating this rule is also nationally applicable.[3] As such, EPA does not intend to take any actions, even if they are only reviewable in another federal Circuit Court of Appeals, that are inconsistent with the decision of the D.C. Circuit. EPA acknowledges, however, that if the *EME Homer City* decision is reversed or otherwise modified by the Supreme Court, at that time EPA may need to revisit its conclusion that this action does not trigger an obligation for EPA to promulgate a FIP.

Comment 2: The commenter contends that even if EPA chose to follow the *EME Homer City Generation* decision, EPA should acknowledge that the disapproval starts a FIP clock and then move expeditiously to provide Utah with the information the *EME Homer City* court said EPA

[3] In this respect, the D.C. Circuit's *EME Homer City* decision is distinguishable from decisions of other Courts of Appeal involving petitions for review of EPA actions under the CAA that are "regionally or locally applicable" within the meaning of section 307(b)(1). *E.g.*, *Summit Petroleum Corp. v. U.S. EPA*, 690 F.3d 733 (6th Cir. 2012).

must provide.

Response 2: EPA disagrees. As discussed in the response to comment 1, unless the D.C. Circuit's decision in *EME Homer City* is reversed or otherwise modified, disapproval of Utah's 2006 $PM_{2.5}$ infrastructure SIP as it relates to section 110(a)(2)(D)(i)(I) does not give EPA authority, much less obligate it, to promulgate a FIP for Utah. EPA intends to move forward expeditiously to address the interstate transport requirements of the CAA in accordance with all applicable court decisions.

Comment 3: The commenter states that the D.C. Circuit lacked jurisdiction in the *EME Homer City* decision to address whether or not a 2 year FIP clock should have started to run, because that issue was not timely raised in a challenge to the June 9, 2010 (75 FR 32673) finding of failure to submit. Citing footnote 34 of the *EME Homer City* opinion, the commenter argues that the opinion acknowledged that the court was not overturning the June 9, 2010 finding of failure to submit in which EPA stated that a FIP clock was started by the finding.

Response 3: The Supreme Court granted certiorari and agreed to consider all three questions presented in the United States' petition, including whether the D.C. Circuit lacked jurisdiction to consider the challenges on which it granted relief. However, as explained above we do not intend to take any actions that are inconsistent with the D.C. Circuit's *EME Homer City* decision unless that decision is reversed or otherwise modified. The D.C. Circuit clearly held that EPA lacked authority to promulgate the CSAPR FIPs even though it acknowledged that for each state subject to a CSAPR FIP EPA had previously disapproved that state's 110(a)(2)(D)(i)(I) SIP submission or had previously found that the state had failed to submit a 110(a)(2)(D)(i)(I) SIP. *EME Homer City*, 696 F.3d at 31-37. Also, in the very same footnote cited by the commenter, the court stated: "[A] State cannot be 'required' to implement its good neighbor obligation in a

SIP 'submission' — nor be deemed to have submitted a deficient SIP for failure to implement the good neighbor obligation — until it knows the target set by EPA." *Id.* at 37 n.34. In our disapproval of the Utah submission, we are acting consistently with the D.C. Circuit decision, even as expressed in the footnote cited by the commenter.

III. Final Action

EPA is disapproving the 110(a)(2)(D)(i)(I) portion of Utah's September 21, 2010 submission. We are disapproving this portion of the submission because it fails to demonstrate that the Utah SIP is adequate for the requirements of 110(a)(2)(D)(i)(I). As explained in detail in our proposal and our response to comments, unless the decision of the D.C. Circuit in *EME Homer City* is reversed or modified, this disapproval will not trigger an obligation for EPA to promulgate a FIP to address these interstate transport requirements, nor does it require Utah to submit a revised interstate transport SIP to meet the requirements.

IV. Statutory and Executive Order Reviews

Under the Clean Air Act, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the Clean Air Act. Accordingly, this action merely disapproves state law that does not meet Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this action:

- is not a "significant regulatory action" subject to review by the Office of Management and Budget under Executive Order 12866 (58 FR 51735, October 4, 1993);
- does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 et seq.);

- is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 et seq.);
- does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);
- is not subject to requirements of Section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the Clean Air Act; and
- does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

In addition, this rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), because the SIP is not approved to apply in Indian country located in the state, and EPA notes that it will not impose substantial direct costs on tribal governments or preempt tribal law.

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business

Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this action and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the Federal Register. A major rule cannot take effect until 60 days after it is published in the Federal Register. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

Under section 307(b)(1) of the Clean Air Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by [FEDERAL REGISTER OFFICE: insert date 60 days from date of publication of this document in the Federal Register]. Filing a petition for reconsideration by the Administrator of this final rule does not affect the finality of this action for the purposes of judicial review nor does it extend the time within which a petition for judicial review may be filed, and shall not postpone the effectiveness of such rule or action. This action may not be challenged later in proceedings to enforce its requirements. (See section 307(b)(2)).

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq*.

Dated: July 26, 2013.

Shaun L. McGrath,
Regional Administrator,
Region 8.

[FR Doc. 2013-19200 Filed 08/08/2013 at 8:45 am; Publication Date: 08/09/2013]